

## **Pre-registration input tax on goods**

[Nidera Handelscompagnie BV \(C-385/09\)](#)

### **Summary**

The ECJ has held that a person does not lose the right to input tax deduction on goods consumed prior to him notifying the authorities that he is a taxable person. Wider implications may arise from a view that the case provides further support for the proposition that there is no requirement for domestic output tax to be chargeable in order for VAT to be deductible on related inputs. This is particularly significant where a business establishes in one Member State and exports or supplies most of its goods or services outside of that Member State.

### **Background**

This case concerns national legislation restricting the right to deduct VAT to taxable persons registered for VAT in Lithuania, and restricting the right to deduct VAT on goods and services acquired by a taxable person before his registration for VAT if those goods and services have already been used for the purposes of the taxable person's transactions.

In 2008, Nidera Handelscompagnie B.V. (Nidera), a Dutch taxable person not established in Lithuania, purchased goods with local VAT in Lithuania and exported them outside the EU (a zero-rated supply). Nidera was not registered for Lithuanian VAT when the above transactions were performed. The company registered for VAT a few months later and reported deductible VAT in its first Lithuanian VAT return. According to Lithuanian VAT law, pre-registration input VAT could be deducted only if the supplies were performed after VAT registration. Therefore the tax authorities denied VAT deduction on the goods purchased and exported prior to VAT registration. (It is worth mentioning that the VAT registration rules did not require exporters to be registered for VAT but, on the other hand as mentioned above, the VAT deduction rules did not allow VAT deduction without VAT registration).

Nidera appealed to the Commission on Tax Disputes, which referred the following questions to the ECJ:

"Is legislation under which the right to deduct VAT is given only to VAT payers — that is to say, only to taxable persons registered as VAT payers in a Member State (in this case, in Lithuania) according to the established procedures — in accordance with the provisions of Directive 2006/112/EC governing the right to deduct VAT?

If the answer to the first question is in the affirmative, is it in accordance with the general principles of the right to deduct VAT that are laid down in Directive 2006/112/EC if such

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legislation provides that a VAT payer has the right to deduct input and/or import VAT in respect of goods and/or services acquired before the date of his registration as a VAT payer only if those goods will be used for an activity of that VAT payer that is subject to VAT, that is to say, input and/or import VAT in respect of goods and services acquired before the date of his registration as a VAT payer may not be deducted if those goods have already been used for that activity?"

At the hearing on 1 July 2010, the Commission supported Nidera's view that a taxable person shall be entitled to deduct VAT in so far as the goods and services purchased are used for taxable activities, even though the supplies are zero-rated. Art 178 of Directive 2006/112/EC requires a taxable person to hold an invoice issued in accordance with certain invoicing requirements. However, VAT registration is not a mandatory condition to be met in order to exercise the right of deduction. If national legislation requires a taxable person to register for VAT and this person fails to do so, only administrative penalties could be imposed.

### **Held**

The ECJ considered that Member States may limit the right of deduction only in the cases specifically provided for in the VAT Directive. In addition, the ECJ considered that the principle of VAT neutrality requires deduction of input tax if the substantive requirements are fulfilled, even if the taxable person has failed to comply with some of the formal requirements. Importantly, the ECJ emphasised that whilst there is an obligation on the part of taxable persons to state when their [economic] activity commences, changes or ceases, that obligation in no way authorises Member States to deprive a taxable person of the right to deduct.

*The ECJ therefore ruled that:*

"the VAT Directive ... must be interpreted as precluding a taxable person for VAT purposes who meets the substantive conditions for the right of deduction, in accordance with the provisions of that directive, and who identifies himself as a taxable person for VAT purposes within a reasonable period following the completion of transactions giving rise to that right of deduction, from being denied the possibility of exercising that right by national legislation which prohibits the deduction of VAT paid on the purchase of goods if the taxpayer was not identified as a taxable person for VAT purposes before using those goods in his taxable activity."

### **Comment**

This case may have implications for many businesses and many Member States. In essence, the Court's judgment appears to re-emphasise the sanctity of the right to deduct input tax, but perhaps goes considerably further.

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It is important to remember the facts in this case, that the input tax claimant had not notified the Lithuanian authorities that he was a taxable person at the time the goods were exported to a third country. That did not preclude the taxpayer, once he had notified the authorities and registered for VAT, from deducting the input tax used to make the supply of the exported goods. The Court did include a qualification that a Member State was entitled to impose a reasonable time limitation period for a taxable person to identify themselves as a taxable person, but that in the instant case, the taxpayer had notified the authorities within six months and that was within a reasonable period of time.

In the UK, pre-registration input tax in relation to goods is not deductible, save as HMRC may allow, where the goods are consumed before the taxable person was registered or required to be registered. This judgment appears to question the validity of that restriction, although HMRC does have the power to backdate a VAT registration and register a person "from such earlier date as may be agreed between them and him." There has also been an ongoing debate as to whether a taxable person should be determined in accordance with the EU law definition (of conducting economic activity under art 9 of the Principle VAT Directive) or the UK definition of a person who is registered or required to be registered under s 3 VAT Act 1994. In some historic domestic cases, a person who was eligible to register but was trading beneath the VAT registration threshold was regarded as an 'exempt' trader and on that basis was denied deduction of input tax incurred before registration.

For businesses with blocked VAT in other jurisdictions where a Member State has denied input tax deduction on pre-registration goods, this case may lend support to the technical view that input tax deduction is required by EU law.

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